

Testimony in Support of SB 376
Before the Senate Natural Resources and Energy Committee
February 5, 2007

Chairman Lind, members of the Committee, thank you for the opportunity to testify in support of SB 376. My name is Gerald Mueller. I live at 440 Evans in Missoula. Phone 543-0026

I testify on behalf and at the direction of the Clark Fork River Basin Task Force (Task Force), the entity that asked for the introduction of this bill. The Task Force was established in 2001 by a state statute in response to concerns about Clark Fork River basin water rights, water supply and water management. A list of Task Force members is attached to this testimony. In this same statute, 85-2-350, the Task Force was assigned the job of writing a water management plan for the Clark Fork River Basin that identified options to protect the security of water rights and provided for the orderly development and conservation of water in the future.

The Task Force did prepare and send to the governor and the legislature in September 2004 the *Clark Fork Basin Watershed Management Plan (Plan)*. Much of the *Plan* was adopted into the State Water Plan in 2005.

Two key findings of the *Plan* were that because of lower basin hydropower water rights, water is unlikely to be legally available for appropriation for new water rights, and water rights junior to the hydropower rights are at risk of being called most of the time. The lack of legal availability of water in the basin was recently confirmed by a proposed DNRC hearings examiner ruling denying a water rights permit application.

To remedy this situation the *Plan* proposed that the state seek to negotiate a contract with the US Bureau of Reclamation (BOR) for water stored in Hungry Horse Reservoir. By contracting for Hungry Horse water, the state could then lease it to support new basin water uses and to mitigate the need for the lower basin hydropower utilities to make a call on junior water right holders. In 2005, the legislature passed House Joint Resolution 3, which urged DNRC to enter into negotiations with the BOR to determine the availability and cost of water stored behind Hungry Horse Dam for which the State of Montana might contract to support existing water use and future water development in the Clark Fork River basin.

In a September 2006 meeting with Mary Sexton, the BOR Regional Director, Bill MacDonald, stated that the state can contract for an amount of water in Hungry Horse, but not pay for the water until it would actually be used. In effect, through a contract, the state can reserve Hungry Horse water to support future Clark Fork River basin water uses.

An existing statute, 85-2-141, caps the total amount of water that the state can lease throughout the entire state to 50,000 acre-feet. This cap was originally passed in 1985 as a result of concerns raised by the Energy Transportation Systems, Inc. (ETSI), coal slurry pipeline proposal and the US Supreme Court Decision in Sporhase vs. Nebraska. The State of South Dakota had agreed to sell ETSI 50,000 acre-feet of water from the Oahe Reservoir to allow coal to be transported from coal fields near Gillette, Wyoming to Arkansas and Louisiana. In Sporhase, the US Supreme Court ruled that water is an item of interstate commerce, and as such, the states may not simply prohibit its export. The legislature, therefore, sought to limit, but not prohibit, the use of Montana water for such ventures. Additionally, the legislature saw water marketing as an

opportunity to fund other water related activities such as the statewide water rights adjudication, repairing state-owned water projects, repairing municipal water supply systems, etc. It therefore included in 85-2-141 a requirement that federal water marketing revenue be shared with the state. SB 376 would change 85-2-141 in two ways. First, it raises the total amount of water that the state may lease for beneficial purposes. Instead of a blanket 50,000 state-wide cap, the state may lease up to one million acre-feet for beneficial uses when the source of the water is a federal reservoir and when the water leased is not used to transport water out of the basin in which the reservoir is located. The 50,000 acre-feet state-wide cap remains in effect for water transferred from one basin to another or out of state. The other change deletes the requirement that federal water marketing revenue be shared with the state. Water marketed by the federal government that is leased will not be a source of revenue for other purposes. Montana water users in leasing water from the state will pay only the costs of the leasing program. They will not be paying a water tax.

SB 376 also clarifies that no limit exists on the amount of water for which the state can contract from federal reservoirs. Such a limit is not a good idea for two reasons. First, the state can contract for more water than is needed immediately. Second, the state would pay for contracted water only when it is actually used. Thus through a contract for water in a federal reservoir, the state can in effect reserve water for future beneficial uses in Montana.

In closing, DNRC has not yet decided the amount of water that should be requested for Hungry Horse contract. Because of existing constraints on the operation of Hungry Horse, such as downstream endangered species flow requirements, we do not know how much of the BOR's existing 3.5 million acre-feet claimed by BOR in its water right for marketing would actually be available. The Task Force is convinced, however, that the request should not be limited to 50,000 acre-feet, the existing cap on state water leases. We believe that removing the cap, consistent with honoring the concern about inter-basin and out of state water transfers, would be good for Montana water users.

Please act favorably on SB 376.

Thank you.

Clark Fork River Basin Task Force

Name	Organization	Area/Interest Represented
Marc Spratt	RLK Hydro	Flathead Basin above Flathead Lake
Nate Hall	Avista	Hydropower Utilities
Holly Franz	PPL Montana	Hydropower Utilities
Matt Clifford	Clark Fork Pend Oreille Coalition	Conservation/Environment
James Steele	Confederated Salish and Kootenai Tribes	Indian Tribes
Gail Patton	Sanders County Commissioner	Basin Local Governments
Vacant		Clark Fork River Watershed below Flathead River confluence
Arvid Hiller	Mountain Water Company	Municipal water companies and the Clark Fork River Watershed between the confluence of the Blackfoot River and the Clark Fork River and the confluence of the Clark Fork River and the Flathead River
Elna Darrow	Flathead Basin Commission	Flathead Lake
Steve Hughes	Joint Board of Control	Flathead River watershed below Flathead Lake to the confluence with the Clark Fork River
Harvey Hackett	Bitter Root Water Forum	Bitterroot River watershed
Fred Lurie	Blackfoot Challenge	Blackfoot River watershed
Jim Dinsmore	Granite Conservation District & Upper Clark Fork River Basin Steering Committee	upper Clark Fork River watershed
Verdell Jackson, <i>Ex Officio</i>	State Representative	House District 6
Joey Jayne <i>Ex Officio</i>	State Representative	House District 15
Jim Shockley <i>Ex Officio</i>	State Senator	Senate District 45